IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4117 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PACHANBHAI SADABHAI PATEL THRO.P.O.A. HOLDER

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4117 of 2002

MR CB DASTOOR for Petitioner No. 1-2

Mr. H.C. Patel, AGP for Respondent No. 1-2

DS AFF.NOT FILED (R) for Respondent No. 3

RULE SERVED BY DS for Respondent No. 4

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 21/11/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Dastoor for the petitioners and Mr. H.C. Patel, learned AGP for respondents No. 1 and 2. Notice has been served upon the respondents no. 3 and 4 but they have not remained present before this court either in person or through any advocate. This petition was admitted by this court by issuing rule thereon on 27th September, 2002 and it was made returnable on 21st November, 2002 i.e. today and the ad interim relief granted earlier was directed to continue and that time, notice of admission was waived by the learned AGP Ms. Vyas on behalf of the respondents no. 1 and 2.

In this petition, the petitioners has challenged the order passed by the revisional authority namely Deputy Secretary (Appeals) Revenue Department, State of Gujarat, Gandhinagar dated 12th October, 1999 under section 211 of the Bombay Land Revenue Code.

Learned advocate Mr. Dastoor appearing for the petitioners has submitted that the revisional authority has rejected the prayer made by the petitioners for regularization of the land in question only on the ground that as per the Government Resolution, the petitioners are having more than eight acres of land and, therefore, they are not entitled for more land and are not entitled for the land which has been encroached by them and therefore, their revision application has been rejected by the revisional authority. He further submitted that in village Jalotara Taluka Vadgam, in joint account of Patel Ramji Sadabhai and Panchanbhai Sadabhai, joint account no. 308, they are occupying total 22 acres 7 gunthas of land. Their sons Jetha Ramji in Account No. 485 is having land ad measuring 3 acres 14 gunthas and Faljibhai Panchanbhai is having the land ad measuring 4 acres 13 gunthas in account no. 98. Land bearing survey no. 4 ad measuring A.47.15 G. paiki 4.07.58 appears to be the Government waste land. It has been alleged against the petitioners that the petitioners has encroached upon the adjoining land bearing survey no. 4 ad measuring 9 acres 28 gunthas and, therefore, considering the total land in respect of two petitioners, it comes to more than 16 acres and on that ground, the revisional authority has rejected the prayer made by the petitioners. He has also submitted that in the year 1954, in survey no. 28, the petitioners are having 22 acres 3 gunthas of the land. Petitioners NO.2 Jethabhai is having land ad measuring 3 acres 14 gunthas in survey no. 480/471. Total land has been encroached by the petitioners from survey no. 4 ad measuring 9 acres 28 gunthas. Learned advocate Mr. Dastoor has submitted

that he is relying upon the Government Resolution dated 8th January, 1980 at page 38, paragraph 6 and sub clause (2) as well as paragraph 6 sub paragraph (5)(b) and (c) and has submitted that according to paragraph 6, sub paragraph 2, it has been suggested that if the encroached land is possessed by the person more than eight acres or he is having more than eight acres of land, then, such land can be regularized with a condition that it may not be in excess of more than eight acres and rest of the encroachment upon the land is required to be removed. He has also submitted that the term 'technical encroachment" has been defined in paragraph 5 of the resolution at page 40 of the petition and in case of technical encroachment, the Government orders dated 1st March, 1960 are applicable and such encroachments could be regularized on a condition that it may not exceed the ceiling of 16 acres. He has submitted that the case of the petitioners is covered by the term 'technical encroachment' on the ground that the land bearing survey no. 28 and 4 are adjoining to each other and, therefore, by mistake, some portion upto 9 acres 28 gunthas has been encroached by the petitioners because at that time, no measurement has been recorded by the Government Officers. He has also submitted that the revisional authority has considered this resolution dated 8th January, 1980 for the limited purpose but the revisional authority has not considered this resolution for the purpose of technical encroachment which has been done by the petitioners and, therefore, he submitted that the entire Government Resolution dated 8th January, 1980 has not been taken into consideration by the revisional authority and, therefore, orders passed by the revisional authority may be set aside and the matter may be remanded back to the revisional authority for enabling the revisional authority to consider the entire Government resolution dated 8th January, 1980 in light of the facts narrated by the petitioners.

On the other hand, learned Assistant Government Pleader Shri H.C. Patel has submitted that in view of the order passed by the revisional authority, encroachment upon the land bearing survey no. 4 made by the petitioners has been removed and at present, the land in question is in possession of the State Government for the last about two years. He further submitted that the Government Resolution dated 8th January, 1980 is providing for two situations for regularization of the land under encroachment. He further submitted that if the encroachment is more than eight acres or a person is possessing more than eight acres, then, the land cannot be regularized in excess of eight acres if he is having possession of more than eight acres and the rest of such

encroachment is required to be removed. However, in case of technical encroachment which was not known to the concerned person because some time proper measurement is not recorded or the measurement has not been recorded immediately, then, in such cases, the Government has provided ceiling or limit upto 16 acres for one person but he has clarified that whether the encroachment upon the land bearing survey no. 4 upto 9 acres 28 Gunthas is technical or not has to be examined by the revisional authority and thereafter, question as to whether the petitioners are entitled for the benefit of paragraph 5 at page 40 will arise and not otherwise. Thus, it was his submission that it will have to be decided by the revisional authority as to whether the encroachment on the land in question can be considered to be the technical encroachment or not and if yes, whether the petitioners are entitled for the benefit of para 5 of the said resolution or not.

I have considered the averments made in the memo of petition. I have also considered the submissions made by the learned advocates for the parties before this court. Aforesaid Government Resolution dated 8th January, 1980 is very much clear. It is also clear that the revisional authority has considered the said Government Resolution dated 8th January, 1980 in part and has not considered the said resolution in its entirety. It is clear that the revisional authority has considered only para 6 sub para 2 that the petitioners are having more than eight acres of land and, therefore, prayers made by the petitioners for regularization of the land in question has been rejected on that ground alone without considering as to whether the encroachment over the land in question is technical or not and if it is technical, whether the petitioners are entitled for the benefit of paragraph 5 of the said resolution or not. That part of the resolution has not been considered by the revisional authority while rejecting the revision application. Looking to the facts of the present case, right from the year 1954, the petitioners are having 22 acres 3 gunthas of land from the land bearing survey no.28 and petitioners no. 2 Jethabhai is having 3 acres 14 gunthas of land from survey no. 480/471 and the encroachment upon the land bearing survey no. 4 is coming to 9 acres 28 gunthas. It is also clear that the land bearing survey no. 4 is adjoining to survey no. 28. Map has been shown by the learned AGP Mr. H.C. Patel and looking to the map, both the said survey numbers are adjoining to each other. Similarly, in between the land bearing survey no. 28 and 4, there is a small road and beyond that road, the petitioners have encroached upon

the land bearing survey no. 4 to the extent of 9 acres 28 gunthas which is belonging to the Government. As per my view, this aspect has not been considered by the revisional authority and the revisional authority has considered the Government Resolution dated 8th January, 1980 in para 6 alone and has not considered the said Resolution in its entirety. As per my view, if the revisional authority would have considered the said Resolution in its entirety, then, it would definitely have considered as to whether the encroachment in question could be considered to be technical or not and if yes, whether the petitioners are entitled for the benefits of para 5 of the said resolution. This aspect has not at all been considered by the revisional authority while rejecting the revision application of the petitioners. I am of the view that this is the basic error committed by the revisional authority in not considering the said resolution in its entirety and, therefore, interference is necessary. Therefore, in view of these peculiar facts of the present case, according to my opinion, order passed by the revisional authority is required to be quashed and set aside by remanding the matter back to the revisional authority for considering the Government Resolution dated 8th January, 1980 in its entirety and for passing fresh orders in accordance with law within some reasonable period. I am of the view that if such orders are passed, it would met ends of justice.

In the result, this petition is allowed. Order passed by the Deputy Secretary (Appeals) Revenue Department, State of Gujarat in Revision Application NO. 90 of 1995 dated 12th October, 1999 is hereby quashed and set aside. Said revisional application is hereby remanded back to the revisional authority with a direction to reconsider the matter in view of the Government Resolution dated 8th January, 1980 and to consider the case of the petitioners that whatever encroachment made upon the land bearing survey no. 4 by the petitioners, whether it is technical encroachment or not and then to consider relevant provisions of the Government Resolution dated 8th January, 1980 and pass appropriate orders in accordance with law after giving reasonable opportunity to the parties before it within three months from the date of receipt of copy of this order. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Direct Service is Permitted.

Dt.21.11.2002. (H.K. Rathod,J.)

Vyas